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IN THE

SUPREME COURT

OF THE UNITED STATES

No. 76-63

JAMES HOLSHOUSER, GOVERNOR OF THE STATE OF NORTH CAROLINA, ET AL.

Appellants,

vs.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A WASHINGTON STATE AGENCY

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF APPELLEE

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Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF APPELLEE

JURISDICTION

The appeal herein is from a final judgment made and entered in the United States District Court for the Eastern District of North Carolina. The judgment enjoins the enforcement of part of a state statute. The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. § 1253.

The final judgment was entered April 22, 1976. Notice of Appeal was filed on May 20, 1976, in the United States District Court for the Eastern District

of North Carolina. The Jurisdictional Statement was filed on July 16, 1976, and the question of jurisdiction was postponed on October 4, 1976. ..... U.S. ....., 45 U.S.L.W. 3220 (October 5, 1976).

QUESTIONS PRESENTED

The appeal from the decision of the three-Judge federal district court in North Carolina, opinion and judgment reported in 408 F. Supp. 857 (E.D.N.C. 1976) and printed in the jurisdictional statement as Appendix A, presents three questions:

(1) Did the Washington State Apple Advertising Commission have standing to institute this action?

(2) Was the jurisdictional amount requirement of 28 USC § 1331 met?

(3) Did the court below correctly declare that North Carolina General Statute § 106-189.1 was unconstitutional and correctly enjoin the enforcement of that statute insofar as it precluded the display of the Washington State grades on closed containers of apples shipped into the State of North Carolina?

APPELLEE'S MOTION TO AFFIRM OR DISMISS PURSUANT TO RULE 16

The appellee Washington State Apple Advertising Commission has previously filed a motion requesting that this Court either affirm or dismiss pursuant to Rule 16. That request was based upon the proposition that the questions presented by the appellants' jurisdictional statement do not constitute

substantial federal questions which warrant consideration by this Court. The Court by order dated October 4, 1976, has ruled that:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

STATEMENT OF THE CASE

Washington State is the nation's leading producer of apples, producing approximately 30% of the apples grown in the United States. Nearly 50% of all the apples shipped in closed containers to fresh markets in interstate commerce are apples grown in the State of Washington (A. 16). The State of Washington has recognized the need to protect the reputation of its apples by requiring that all apples shipped out of the State of Washington must meet stringent mandatory inspection requirements. This mandatory inspection at the point of origin is unique in the apple industry. (A. 19) During the sixty years that Washington apple grades have been in existence, they have gained a substantial trade acceptance in the fresh fruit wholesaling business. (A. 18) It is common for apple dealers outside the State of Washington to indicate a preference of Washington State apple grades over U.S. grades because of the consistency of the application of the Washington State grades with their emphasis upon color and mandatory prior inspection. (A. 19) The mandatory inspection requirement by the State of Washington costs the apple growers in Washington

State approximately $1,000,000 annually for inspecting approximately 40,000,000 bushel-boxes of apples.

The Washington State legislature created the appellee, Washington State Apple Advertising Commission, as a state agency. The commission is charged with the responsibility of promoting the welfare of the state and stabilizing and protecting the apple industry of the state as well as expanding and protecting the state apple market in the public interest. It further has responsibility to enhance the reputation of Washington apples in domestic and foreign markets. (A. 49-50; Revised Code of Washington 15.24.900; A. 48; Revised Code of Washington 15.24.160) The members of the commission are nominated by apple growers and dealers in the State of Washington and are elected by them within electorial districts by secret ballot. (A. 41, 43) To finance the operations of the commission, an assessment is imposed upon the apple growers which in 1974 totalled $1,737,990. The assessments can be increased only upon being approved by one-half of the apple growers in an election. (A. 46; Revised Code of Washington 15.24.090)

The North Carolina Board of Agriculture adopted an administrative regulation, No. 324.5(6), which read in part:

> "Apple containers must show the applicable U.S. grades * * * State grades shall not be shown. * * * "

This regulation presented a substantial problem for

the marketing of Washington State apples and, therefore, the Washington Apple Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the showing of state grades. An administrative hearing was held before the board in North Carolina on March 19, 1973. (A. 104) Shortly following that administrative hearing, North Carolina General Statute § 106-189.1 was introduced and passed by the North Carolina General Assembly:

> "(a) All apples, sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle no grade other than the applicable U.S. grade or standard or the marking 'unclassified', 'not graded' or 'grade not determined.'
> " * * * "

This statute, which is the subject of this litigation, does not require that apples grown in or shipped into the state of North Carolina be graded. The statute requires that apples in closed containers which do bear a grade must bear the U.S. grade, and no other grade is permitted. In 1974 after the Washington State Director of Agriculture had amended the Washington State apple grades so that they were equivalent or superior to comparable U.S. grades, the Washington Apple Commission requested permission, to ship apples in closed containers showing both the Washington grade and the U.S. grade, from the North Carolina Commissioner of Agriculture. The North Carolina commissioner candidly responded

that before such permission could be granted, it would be necessary to have the law which was passed in the 1973 North Carolina legislature amended to permit this, and "I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed * * *" (A. 19-21)

The concern of the Washington Apple Commission and the growers, packers and dealers which it represents with respect to the North Carolina law is reflected in affidavits on behalf of firms which account for in excess of 30% of the entire annual crop of Washington State apples which are shipped fresh in closed containers.[1] The practice of the apple industry in the State of Washington is to order shipping containers of one bushel capacity for packed apples in advance of the harvesting season. These containers are pre-printed with the appropriate variety and grades and are subsequently filled with apples of the appropriate grade. (A-17, 63) A substantial portion of the Washington apples are held in cold storage and by February 1 of each year approximately two-thirds of all the apples on hand to be sold on the fresh markets in the United States are apples grown in the State of Washington. (A. 98-99) The shipping containers each containing one bushel of apples are then shipped to all parts of the United States. In the

[1]C. W. Schulke (A. 62-66) and the following affidavits, which are not printed in the appendix, filed on January 29, 1976; Herbert L. Frank (1/20/76); Dick Shumway (1/22/76); Richard Larsen (1/23/76); Frank Coleman (1/20/76); Clayton Udell (1/20/76); Robert Scea (1/23/76); Bill Hartmann (1/24/76).

1974 crop year, Washington growers shipped approximately 339,000 boxes of apples worth in excess of $2,000,000 directly into the State of North Carolina. (A. 17) Other Washington apples were trans-shipped into North Carolina from distribution centers in surrounding states. These trans-shipments represent approximately an additional 140,000 boxes being shipping into North Carolina in the 1974 crop year. (A. 17) The requirement of the removal of Washington grades, which have been extensively used for over 60 years, from shipping containers going into the State of North Carolina has had the following impact upon the distribution of Washington apples:

(1) There has been a cancellation of orders for apples by customers within North Carolina and in adjoining states faced with the problem of remarking for reshipment to North Carolina; (A. 64)

(2) Washington processors of apples have been required to either obliterate the Washington State grades on the pre-printed containers at a cost of between 5¢ to 15¢ per box for apples destined for North Carolina (this reflects an annual cost of $23,950 to $71,850) or to discontinue the use of pre-printed boxes showing Washington grades, which creates problems in other markets; (A. 17, 63)

(3) There has been a reluctance by some Washington growers and packers to accept orders from North Carolina because of problems in complying with the North Carolina statute. (A. 63-64)

The Washington State Apple Commission in 1974 expended in excess of $25,000 for advertising and promoting Washington apples within the State of North Carolina. (A. 17) The shipping containers which have the Washington State grades upon them are seldom sold to retail customers in such containers. (A. 18) The boxes are delivered to retail establishments where most of the sales thereof are from open bins or in plastic bags. Wholesalers and brokers who are doing business in North Carolina and South Carolina have indicated that, on the basis of years of experience, they rely upon Washington State grades and desire to have that information when buying and selling apples. (A. 67, 71)[2] Further, they have not been confused by the existence of the Washington grade on containers which they have received in the past. (A. 68, 72)[3]

The Washington State Apple Advertising Commission, having been unsuccessful in its attempts administratively to solve the problems presented by the North Carolina statute, commenced this action to fulfill its responsibilities under Washington state law to promote domestic markets for Washington apples. The costs of the suit are borne by the Washington apple producers and growers who are assessed by the commission to carry out its responsibilities and the action was brought to protect their interests.

[2]Additional affidavits not included in the appendix: Gillis Coleman (1/19/76) filed 1/29/76; Arlis Vernon (1/23/76) filed 1/26/76; John C. Taylor (1/23/76) filed 1/26/76; Joe McGee (1/22/76) filed 1/26/76; Avery Womble (1/22/76) filed 1/26/76.

[3]Ibid.

The three-judge federal court enjoined the State of North Carolina from applying as to Washington State apples that portion of the statute § 106-189.1 which prohibited the display of state grades. The court did not invalidate the statutory requirement that the U.S. grades must be displayed.

SUMMARY OF ARGUMENT

Washington State apple grades have been in existence for 60 years. The State of Washington requires that all apples shipped outside the state must meet stringent grading requirements and be so labeled. This program is designed to insure the quality of Washington apples and to secure and enhance their reputation throughout the world since the apple industry is a major industry within the State of Washington. The Washington State apple grades are the equivalent or superior in every respect to the comparable U.S. grades.

The North Carolina statute which prohibits the display of state grades has had a severe impact upon the interstate commerce of Washington apples. The efficient processing of Washington apples involves the use of preprinted containers which indicate the respective state grades. This grade label identifies the product for wholesalers and dealers throughout the world and further facilitates the effective handling of apples in cold storage warehouses. The North Carolina statute requires the discontinuation of such preprinted containers or, alternatively, the obliteration of such state grades upon any apple containers

being shipped either directly or indirectly into the State of North Carolina. We respectfully concur with the conclusion of the three-judge United States federal district court that such a prohibition violates the Commerce Clause of the United States Constitution.

We believe the same result is also supported by two alternative grounds which the district court did not have to reach in rendering its judgment. First, the North Carolina statute constitutes an unconstitutional restriction on the 1st Amendment right of free speech since the labeling of state grades conveys accurate, factual information which may be considered in the nature of commercial speech. The second ground is the unreasonable classification by the State of North Carolina in (i) singling out only apples of the various fresh fruit for distribution in the state, and (ii) not applying the statute to any apples in open containers, which encompasses the vast majority of the apples produced within the State of North Carolina.

The appellee Washington State Apple Advertising Commission has standing to institute this action both on behalf of itself and its members, the Washington State apple producers who elect the membership of the commission and pay for its costs by assessments. Further, the commission has under state law the authority to sue and to enhance the domestic market for Washington apples. The economic impact of the North Carolina statute is substantially in

excess of the $10,000 jurisdictional amount, 28 USC § 1331, both upon the commission and the Washington apple producers. We respectfully submit that the federal district court had jurisdiction to entertain the action, properly decided the same, and should be affirmed by this Court.

ARGUMENT

A. Interstate Commerce — Article I, § 8, Clause 3, United States Constitution.

(1) *Introduction.*

This Court on numerous occasions has considered the scope of the Commerce Clause in reference to state power for the regulation of commerce. In *Welton v. Missouri*, 92 U.S. 275 (1876), this Court stated that commerce comprehends any intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between citizens of different states. It is clear that the transportation and subsequent sale of Washington apples shipped from the State of Washington and distributed within the State of North Carolina comes within the ambit of the Commerce Clause. The purpose of the Commerce Clause of the United States Constitution is to create an area of free trade among the several states. Thus, the Commerce Clause is a limitation upon the power of states even without Congressional action. (See, *The Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Although the appellants' brief makes reference to a report by a study team of the

United States Department of Agriculture in 1972 and a proposal by the Department for uniform grading nomenclature (App. Br. 22-23), there has not been any federal legislative or administrative action creating a federal preemption of the subject matter of this litigation.

Although the federal government has the authority to regulate the branding of perishable fruits and produce sold in interstate commerce, it has not chosen to preempt this field. While there are references in the record and in the briefs to United States grades for apples, there is no federal requirement that apples be graded in accordance with those standards. The United States grades for apples are a label which if used then must meet the qualifications of the grade. There is no requirement of preinspection nor a compulsion to utilize U.S. grades for apples shipped in interstate commerce. The United States Department of Agriculture regulation concerning the inspection, certification and standards of fresh fruits and vegetables, which includes apples, published in 32 Fed. Register 15066, effective December 1, 1976, § 61.13 states:

> Inspection and certification service for quality and/or condition shall be based upon the appropriate standards promulgated by the U.S. Department of Agriculture, *applicable standards prescribed by the laws of the states where the particular product was produced*, specifications of any governmental agency, written buyer and seller contract specifications, or written specification by an applicant which is provided by the

> administrator: Provided, that if such product is regulated pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601 et seq.), or *comparable laws of any state*, such inspection and certification shall be on the basis of the standards, if any, prescribed in, or pursuant to, the marketing order and/or agreement effective thereunder. (Emphasis supplied)

We would emphasize that the desirability or undesirability of requiring a single uniform U.S. grade for apples throughout the United States is not an issue in this proceeding. The issue is whether the State of North Carolina, which does not require the grading of apples either grown or shipped into the State of North Carolina, can prohibit the State of Washington from displaying its grades, which are equal or superior to U.S. grades in all respects.

(2) *Balancing test.*

When the exercise of a state's police power interferes with interstate commerce, the question becomes whether the burden is unreasonable. While there is no absolute formula to determine reasonableness, this court in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945), established the balance-of-interest test—that is, for a state regulation to be constitutional, its benefits must outweigh the burden on interstate commerce. In balancing the interests, the court is always concerned with the fundamental objective and actual purpose of the state law, and not merely the declared purpose.

Whenever it appears that the true purpose or

objective of the state regulation is to discriminate against the products of another state, or create an economic barrier to the free-flow of commerce, the regulation will be invalidated. "One state in its dealings with another may not place itself in a position of economic isolation." *Dean Milk Company v. City of Madison*, 340 U.S. 349 (1951). The *Dean Milk* case stands for the proposition that the declared purpose for the state's regulation of interstate commerce cannot be for some fanciful reason, but must be based upon a legitimate exercise of a police power designed to promote the public welfare.

More recently, this Court again considered the balancing of local interests protected by statutes and the burden that those statutes impose upon interstate commerce in *Great Atlantic & Pacific Tea Co. v. Cottrell, supra.* While invalidating the Mississippi statute requiring reciprocity in order to permit the importation of milk from another state, this Court relied upon *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In the *Pike* case, an Arizona statute required that cantaloupes grown in Arizona be packed in closed, standard containers approved by the supervisor. The supervisor, by order, prohibited the plaintiff, who was engaged in an extensive cantaloupe farming operation in Arizona, from shipping its cantaloupes in open containers to a plant which it owned and operated in California. This Court, in finding that the Arizona official acted in violation of the Commerce Clause, stated:

> Although the criteria for determining the validity of state statutes offsetting interstate commerce has been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits (citations omitted). If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally, the Court has candidly undertaken a balancing approach in resolving these issues (citations omitted), but more frequently, it has spoken in terms of "direct" and "indirect" effects and burdens (citations omitted). *Id.* at 142. [The above quote, with the exception of the last sentence, was quoted in *Great Atlantic & Pacific Tea Co., supra*, at 371, 372.]

The State of North Carolina has adopted a branding law which applies not only to apples produced in the State of North Carolina but to all apples shipped into the State of North Carolina. Therefore, the North Carolina legislature has attempted to affect apples grown, packed and shipped outside of the jurisdiction of North Carolina by prohibiting the showing of state apple grades. The State of North Carolina, by a not so subtle subterfuge, is attempting to (1) force a uniform federal grade on all apple marketing states and (2) insulate its apple industry

from competition from Washington State. That the true purpose of this legislation is mere trade protection for the North Carolina apple industry, and not consumer protection, is apparent from the exchange of correspondence between the Washington Apple Commission and North Carolina Agriculture Commissioner Graham. Mr. Brownlow respectfully asked that Washington State apples be exempted from the onerous requirements of G. S. § 106-189.1 since the Washington grades are equal or superior to United States grades. (A. 19) Commissioner Graham frankly responded, in effect, that he could not, or would not, authorize such an exemption without checking first with the North Carolina apple growers since *they were responsible* for the legislation:

> I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed and I have asked the Secretary of the Apple Growers Association to bring this matter to the attention of their Board at its next meeting. (A. 21)

(3) *North Carolina's local interest.*

In utilizing the balancing burdens test, consideration must be given to whether the North Carolina statute regulates even-handedly to effectuate a legitimate local public interest. Reference must first be made to what the North Carolina statute does and does not affect:

(i) The statute does not preclude the use of state grades or grades other than U.S. on apples which are sold in open containers. It is noteworthy

that the overwhelming volume of North Carolina grown apples are sold in open containers.

(ii) The statute does not require that apples be graded to meet any specific qualifications, even when sold in closed containers.

(iii) The statute precludes the showing of a state grade even if the United States grade is also indicated.

The State of North Carolina is ostensibly using the aegis and refuge of consumer protection in attempting to find sufficient "public welfare" to justify the existence of this statute, although the statute is silent as to its intended purpose. Moreover, the facts clearly show that the pre-printed Washington State grades on apple shipping containers are not displayed to North Carolina retail consumers. The statute makes no mention of prohibiting the showing of a state grade in a retail store or in any form of advertisement. In any event, since the Washington State grades are equal or superior to the equivalent United States grades in every respect, there simply cannot be any confusion created by a dual showing of the grades. Furthermore, the record establishes that apple wholesalers and dealers in North Carolina prefer and are not confused by the Washington grades.[4] If a buyer acquiring apples under the Washington State grade labored under the illusion that he was acquiring the equivalent United States grade, he

[4]See, A. 67, 68, 71, 72, and affidavits cited in fn. 2. Furthermore, the affidavit of Lew Sterling (A. 109) indicates that none of the appellants' affiants (A. 102-103) buy or receive apples shipped into North Carolina in closed containers.

would always get an apple of equal quality, or, in many cases, an apple of superior quality. The purchasers of Washington apples in shipping containers are wholesalers and distributors, who are knowledgeable in the field and are better informed as to quality of the apples by the display of the Washington State grade in addition to the United States grade.

The appellants' brief does not cite any facts which would support the conclusion that the placing of the Washington State grade upon apple containers produces a confusion by local purchasers. The only material relevant to that contention is a reference to the United States Department of Agriculture Study Team Report in 1972 (App. Br. 23). With reference to that report, it should be noted that the Assistant Secretary of the United States Department of Agriculture stated:

> "It would have to be concluded that with both the federal and state grade upon the container the quality problem would be eliminated. We certainly appreciate your desire to maintain Washington state apple grades particularly when they are well-established." (A. 109)

Further, the facts establish that the individuals who are engaged in the wholesaling and retailing of apples in North Carolina are not confused by the presence of the Washington State grades. (See, A. 66-72; Affs. cited in footnote 2.) This response is important because these are the individuals in the industry who would be affected by the existence or nonexistence of state grades on the containers. The

retail consumer, as previously noted, purchases apples either from a bulk display in a retail establishment or in plastic bags. In neither situation does the existence of the Washington State grade on the shipping container come to their attention. Thus, in no way can it confuse such retail customers.

We contend, therefore, that the local interest which the statute seeks to protect is the economic interest of local apple growers and producers to be free from out-of-state competition. This exercise of police power has often been found in violation of the Commerce Clause; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Polar Ice Cream & Creamery Co. v. Andrews* 375 U.S. 361 (1964); *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511 (1935); *H. P. Hood & Sons, Inc. v. DuMond* 366 U.S. 525 (1949).

North Carolina is saying that Washington growers must be graded according to lower standards and may not display the evidence of Washington's standards. In other words, what the State of North Carolina has, in fact, done with respect to Washington, is to exclude Washington apples which are shipped under higher standards than federal standards, and thus forced the State of Washington to market its apples under a lower standard. This is intuitively unfair; no state should have the right to compel a sister state to follow a less restrictive, and hence, less beneficial to the consumer, standard of grading. As stated in *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963), it is a permissible objective of a

state to promote the marketability, by way of higher standards, of a product of the state to the benefit of the whole industry. This is what the State of Washington has done, and the State of North Carolina has no justifiable basis on which to force the State of Washington to use the lower standards of United States grades when shipping into the State of North Carolina. The Washington apple industry is proud of its product, and wants it graded under stricter standards than competing state industries. It has every right to do this.

(4) *Burdens on interstate commerce.*

The three-judge court has properly found that as a direct result of the enactment of the North Carolina General Statute, § 106-189.1, there has been the following impact upon apple growers in the State of Washington:

> "(a) Washington state grades have been manually obliterated from closed shipping boxes to be shipped to North Carolina at a cost of 5 to 15 cents per box;
> "(b) Preprinting of shipping boxes with state grades has been abandoned and the applicable United States grade stamped manually or mechanically on boxes;
> "(c) Accounts in North Carolina have been cancelled, and the sales to the state curtailed. (Some individuals have abandoned marketing in the state entirely.)
> "These results of legislation constitute a burden on interstate commerce." (Jurisdictional Statement A-4)

These impacts upon the interstate commerce

Washington apples extend well beyond the boundaries of the State of North Carolina. As previously indicated, approximately 30% of the Washington apples which are shipped to North Carolina are originally shipped to some other destinations and trans-shipped to North Carolina. This means that if the Washington grades are included on the container, which is permissible in the other 49 states, someone must assume the responsibility of obliterating those grades when the apples are trans-shipped to North Carolina. This has resulted in refusal of some apple handlers to accept that responsibility. Further, the obliteration gives the apple containers a mutilated appearance which is not desirable by wholesalers and shippers. If an apple producing state such as North Carolina can impose this type of restriction, its duplication by a relatively small number of other states could effectively remove the ability to market Washington grades which have been in existence for some 60 years and are established standards well-accepted in the apple industry.

North Carolina growers, in the past, have called for "uniformity" of grades and have attempted to justify their statute on that basis. Two pertinent examples of an unconstitutional state attempt to regulate interstate commerce, under the guise of "uniformity", are *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In the *Bibb* case, the court held that a state statute requiring a particular and pe-

culiar type of mud guard on tractor-trailers, to the exclusion of other model mud guards that were permissible for use in 45 states of the union, constituted an unconstitutional burden on interstate commerce despite the fact that it was nondiscriminatory. The court's reasoning: It would be extremely burdensome and virtually impossible to require interstate motor carriers to stop at the border of each state to change mud guards. Extending this reasoning to the instant case, it would be said that to require the obliteration of Washington State grades, which are acceptable not only in 49 other states, but throughout the world, on apples offered for sale or simply shipped into the State of North Carolina for resale outside the state is analogous to a requirement to change mud guards on trucks at state borders. North Carolina is the only place in the world where it is illegal to show the Washington State grade. Of more significance, in order to satisfy the peculiar requirements of the North Carolina marketing statute, the Washington State apple industry has been forced to alter its whole marketing and inspection program at great inconvenience, confusion and expense. Any claimed benefit to North Carolina consumers simply does not outweigh the predominant federal interest of keeping a free-flow of interstate commerce.

In the *Baldwin* case, *supra*, the court found unconstitutional a New York statute that provided that milk sold in the New York area had to be purchased on terms that would be lawful if the transaction occurred within the State of New York. The court found that New York simply could not legislate in an area outside its jurisdiction in an effort to force other states to conform to New York's economic and public welfare standards. Thus, the *Baldwin* case appears to be unusually germane to the case at bar.

There are three lower federal court decisions also in point with regard to the question of branding and labeling of produce sold in interstate commerce. *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1965); *Armour & Co. v. Nebraska*, 270 F. Supp. 941 (D.C. Neb. 1967); *International Packers Limited v. Hughes*, 271 F. Supp. 430 (S.D. Iowa 1967). These cases all support the contention that the North Carolina statute in question is unconstitutional. Each case involves a statute requiring shippers of imported meat to show through conspicuous labeling that it was meat raised outside of the United States. The three-judge courts in each case noted that the meat produced in foreign countries is by law not permitted entry into the United States *except under federal inspection* and found that there was no legitimate interest in the legislation and that it was merely an attempt to insulate the domestic industry from outside competition.

In *International Packers*, the three-judge court held that the act was discriminatory because the enforcement of the provisions would essentially eliminate the sale of imported meats into Iowa because retailers, fearing an adverse reaction from the con-

suming public, simply would refuse to sell foreign meat so long as they were required to label it as such. In pertinent part, the court said:

> Defendants attempt to support the labeling legislation on the ground that it protects Iowa consumers from deception. Defendants premise their contention upon the assumption that consumers purchasing meat in Iowa believe that they are buying domestic meat. Defendants thus reason that failure to inform consumers as to when they are purchasing imported meats results in deception. Even if plaintiff's basic premise is accepted, there has been no showing that such deception, if any, results in injury or harm to the consuming public. It has not been established that the imported meat is inferior in quality to domestic meat. Even if it were inferior, the labeling statute is designed to inform the public only as to the origin of meat products containing imported meat—not as to the quality of that product. The statute primarily discriminates in favor of domestic meat and against meat imported from foreign countries. This court can find no legitimate state interest justifying the burden imposed upon interstate commerce by the Iowa Meat Labeling Act. The Iowa Act violates the Commerce Clause of the Constitution of the United States and is therefore void and unenforceable. *Id.* at 443.

Likewise, it is obvious that there has been no showing on the part of North Carolina of deception harmful to the public where Washington grades are involved because the Washington grades are equal or superior to equivalent United States grades in every respect. The North Carolina purchaser buying under Washington grades would always get an apple of equal or

superior quality to the same apple purchased under equivalent United States grades.

The true intent of the North Carolina statute can best be determined by considering all the facts and circumstances, and in particular, that the North Carolina apple industry is in *direct competition* with the Washington State apple industry. Where there is direct competition between state industries the courts have been suspect of the stated purposes for justifying any discriminatory regulation concerning labeling. *Florida Avocado Growers v. Paul, supra.*

(5) *Commerce Clause conclusion.*

The appellee respectfully submits that North Carolina General Statute § 106-189.1 insofar as it precludes the showing of state grades on closed apple containers creates an unconstitutional burden upon Commerce, and the minimal to nonexistent local interests of the State of North Carolina cannot justify the imposition of that restriction. The Washington State Apple Adverising Commission therefore respectfully submits that the three-judge court correctly determined that the North Carolina statute violated the Commerce Clause and properly enjoined the enforcement of that provision precluding the showing of Washington State grades.

The appellee has contended that the North Carolina statute violates the Commerce Clause, the 1st Amendment and the Equal Protection and Due Process Clauses of the United States Constitution. In oral argument before the three-judge court, the appellee

pressed the first two of these claims. While the appellee concurs with the conclusion that the Commerce Clause is dispositive of the action, it will proceed to set forth arguments which support the alternative grounds for obtaining the same relief; that is, that the North Carolina statute violates the 1st Amendment to the United States Constitution and/or the Equal Protection and Due Process guarantees.

B. **First Amendment Protection of the Right of Free Speech as Incorporated into the Due Process Clause of the 14th Amendment.**

Washington State apple grades have been in existence approximately sixty years and have gained a substantial trade acceptance and meaning in the fresh fruit wholesaling business. United States grades have been in existence since the late 1930's. Since the Agricultural Adjustment Act, which establishes joint, federal and state inspections, allows for substantial regional control over inspection services, there is a question as to the uniformity of interpretation under United States grades. On the other hand, Washington State apple grades are given carefully controlled, uniform and consistent application within the State of Washington. Moreover, all apples shipped out of the State of Washington must meet stringent and mandatory inspection requirements. This mandatory inspection at the point of origin is unique throughout the apple industry. Therefore, commodity dealers know exactly what Washington State apple grades mean, due to their long history and rigid inspection

standards, and they use that grading system as a criterion for purchasing Washington apples.

It follows that Washington State growers have a right of free expression to show their grade on apple containers; that is, they have the right to show the Washington state grade in preference to showing the United States grade. Conversely, North Carolina buyers, and buyers shipping into North Carolina from secondary sources, have *a right to know* under what Washington grade the Washington apples are being shipped. Since Washington grades emphasize color, a highly influencing factor in consumer purchasing habits, North Carolina and other out-of-state buyers have a right to use the Washington State grading system which uniquely emphasizes color. The State of North Carolina cannot abrogate the grading laws of its sister states unless those grading laws infringe upon some police power reasonably designed to protect the citizens of North Carolina from a health hazard or deception in labeling.

The right to free speech is perhaps the most jealously protected right guaranteed under the Bill of Rights. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

> The freedom of speech and press embrace the right to distribute literature, and necessarily protects the right to receive literature which is distributed. It is said that liberty in circulating is as essential to the freedom as liberty of publishing, since publication without circulation would be of little value. * * * The free publication and dissemination of books and

> other forms of printed word are protected by the constitutional guarantee of freedom of speech and press, irrespective of whether the dissemination takes place under commercial auspices. 16 Am Jur 2d Constitutional Law §344, citing *Smith v. California*, 361 U.S. 147.

To validate a legislative infringement upon this right, the court must find that the police power protecting the interest of the citizens of the State must be of overwhelming inportance.

Here we are concerned with North Carolina requiring the expunging or obliteration of certain information. It stands to reason that the consumer or commercial buyer can only be hindered in making his intelligent informed choice as to what to purchase if he has less information from which to work. Therefore, the North Carolina statute not only infringes upon the right of free expression for the Washington apple growers and the Apple Commission, but also upon the *right to know* of the North Carolina consumer and commercial buyer, as that right is protected by the Privileges and immunities Clause of the First Amendment. Thus, rather than enhancing the public welfare of the State of North Carolina, this statute serves to detract from the public welfare.

The case of *Swift & Co. v. Wickham*, 230 F. Supp. 398 (SDNY 1964) is in point. Swift & Co. placed federally approved labels on its turkeys which indicated the weight of the turkey including the stuffing and innards in the package. The State of New York required that packaged turkeys display

the net turkey weight. The district court stated that it " * * * would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval." The district court opinion was affirmed by the second circuit in 364 F. 2d 241 (1966). The holding of this case clearly indicates a public policy in favor of greater information on labels of closed containers.

Finally, the free speech protections of the Constitution were recently applied with increased vigor to commercial advertising situations. In *Population Services International v. Wilson*, 398 F. Supp. 321 (SDNY 1975) the district court declared unconstitutional a statute prohibiting the dissemination of informational material relating to contraception. The court held that a state-attempted ban on all advertising and displaying of non-prescription contraceptives violated the First Amendment.

Likewise (under facts similar to the instant case), the district court in *Anderson Clayton & Co. v. Washington State Department of Agriculture*, 402 F. Supp. 1253 (W.D. Wash. 1975) held that the State of Washington's attempted ban of the use of the word "butter" in margarine advertisements was a violation of the plaintiff sellers' First Amendment right of free speech and press. Under the statute, sellers of margarine in the State of Washington had to "cut out" or "trim out" comparative references to

butter in their advertising. The court cited the following passage from *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) for authority that "commercial advertisements" have equal status with other forms of speech and press under the First Amendment.

> "The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> The court has stated that 'a state cannot foreclose the exercise of constitutional rights by mere labels.' *NAACP v. Button*, 371 U.S., at 429. Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id* at 1257.

The district court then proceeded to balance the free speech right against the state interest of preventing public confusion, etc.

> "We equate the Plaintiffs First Amendment immunities and privileges and the public's interest in public dissemination of true and honest advertising of factual information regarding food products evenly with that in the ultimate acquisition of prescription drugs, abortion, and contraceptives.
>
> In turn, the Defendants contend that the compelling state interest sought to be protected through the enforcement of RCW 15.40.030 is protection of the public from confusion, fraud and deception in the marketing of margarine.
>
> Assuming, *arguendo*, that Plaintiffs advertisements do carry confusing and deceptive comparative references to the dairy product butter and their margarine products, as the Defendants would have us believe, and the express purpose and force of RCW 15.40.030 is in the pursuit of a legitimate state interest of the state, nevertheless substantial state law restrictions upon the free exercise of per se or fundamental constitutional rights, such as First Amendment immunities and privileges, are unconstitutional unless the state can demonstrate that such laws are necessary to promote a compelling governmental interest. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); and *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)." *Id.* at 1257

C. The Due Process and Equal Protection Clauses of the United States Constitution.

The Fourteenth Amendment, Equal Protection Clause, provides that "no state * * * shall deny any person within its jurisdiction equal protection of the laws." Thus, a state must provide that its application of a given law is nondiscriminatory within its own jurisdiction. The usual legislative method to minimize any inherent inequality or disparity of treatment by the application of a law is to provide for various classes of persons or property.

It is generally accepted that there are three criteria which must be established to support any statutory classification—(1) the classification must be rational; (2) the classification must bear a reasonable relationship to a proper legislative purpose; (3) all persons within a class must be treated equally. In recent years, this Court has employed an even stricter test of reasonableness where the classifica-

tion is based upon "suspect criteria." That test is that there must be a compelling state interest served by the classification. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Measured against these tests of reasonableness, the North Carolina statute in question fails. Gen. Stat. § 106-189.1 is violative of the Equal Protection Clause because: (1) apples are singled out for disparate treatment from all other farm products referred to in the General Marketing and Branding Law under N. C. Gen. Stat. § 106-189, and (2) apples in closed containers, N.C. Gen. Stat. § 106-189.1, are treated differently than apples in open containers, N. C. Gen. Stat. § 106-189.2.

Common sense or experience do not indicate why apples should be treated differently from peaches, grapefruit, pears or any other farm product. There is no apparent or stated reason why state grades are allowed to be shown on closed containers of other commodities, when they are not allowed to be shown on closed containers of apples. Nor, is there any apparent or obvious reason why apples in closed containers may not be marked with a state grade, while apples in open containers may be so marked. It is suggested that the real reason for treating apples in closed containers differently is because this is a thinly-veiled attempt to discourage the Washington State apple industry from competing with the North Carolina apple industry. Obviously, all Washington apples shipped into North Carolina must come in closed containers; this is not true of apples shipped into North Carolina from adjacent states, such as Virginia and West Virginia, which may come in open bushel baskets.

Even if the ostensive purpose of this statute is to protect North Carolina consumers from deception and fraud, there is no clear, cogent and convincing reason why marking apple containers with the Washington State grades amounts to deception when this grade is shown alongside the U.S. grade and the Washington grade is equal or superior to the U.S. grade in every respect.

The North Carolina General Statute § 106-189.1 fails to meet the criteria of reasonableness of classification and is thus violative of the Equal Protection and Due Process Clauses of the 14th Amendment to the United States Constitution.

D. **Standing of the Appellee Washington State Apple Advertising Commission.**

The appellee Washington State Apple Advertising Commission, as previously noted, was created by the state legislature to stabilize and protect the apple industry in the State of Washington and promote the welfare of the state. It is further directed to enhance the reputation of Washington apples in domestic and foreign markets. The commission members are nominated and elected by apple producers and dealers in the State of Washington. The commission is financed by assessments made upon producers which can only be increased following an election by the producers.

Washington State law, RCW 15.24.070(8) (A-45) specifically authorizes the commission to sue or be sued. The commission in order to carry out its responsibilities has instituted this action both on behalf of itself and its members, both of whom have been harmed by the North Carolina statute.

Federal Rule 17(a) describes a real party in interest as including "a party authorized by statute * * * (b). * * * The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized * * *" As previously noted, the Washington State Apple Advertising Commission has statutory authority to sue and thus comes within the provisions of Rule 17.

The appellee suffers substantial injury in its own right. A purpose of the Washington State Apple Advertising Commission is to promote the good will of the Washington apple industry. This is accomplished, in part, through promotional advertising of the Washington State grades. Since this action attacks the North Carolina regulatory scheme for interference with those efforts, the Commission has alleged a direct injury for which it is entitled to seek relief.

Even assuming, arguendo, that the Commission only asserts the right of apple growers or shippers, we contend that the rule against relying on the Constitutional rights of another is not part of the Constitutional requirement of standing, but a rule of self-restraint that the Court has developed for its

own governance, and thus is a mere rule of practice not to be applied where it might preclude one from asserting a grievance before the Court. *Barrows v. Jackson*, 346 U.S. 249 (1953). *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

The question of "standing" was extensively discussed by this Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Sierra Club, a membership corporation alleging a special interest in conservation, challenged the proposed ski development in Mineral King, California. The Sierra Club did not make any allegation in its pleadings that its members would be affected (*Supra*, 731.) This Court observed:

> "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. [Citations omitted]" *Supra*, at 739.

While amicus participating in the *Sierra Club* appeal asserted that some individual members of the club would be affected by the project, this Court noted, *supra*, at 734, footnote 7:

> "Moreover, the Sierra Club in its reply brief specifically declines to rely upon its own individualized interest, as a basis for standing."

In short, in *Sierra Club*, this Court held that the Sierra Club simply failed in its pleadings to allege that its members were damaged by the possible development of the Mineral King skiing area. No such disability exists in the Apple Commission complaint. In the Plaintiff's amended complaint, it has stated:

"In addition, the Washington Apple Commission is charged, among other things, by statute with the stabilization and protection of the Washington State apple industry and the expansion and promotion of the market of Washington apples on behalf of individual Washington Apple Growers. * * *" [A-28, ¶4]

"* * * The Apple Commission is financed by assessments levied on all Washington State Apple Growers in the amount of 12 cents per each 100 pounds of gross billing weight on all apples grown and packed in the State of Washington." [A-28, 29 ¶5]

"Washington State Apple Growers, and Plaintiff, have suffered real, immediate, substantial and irreparable injury, damage and loss since the passage of the North Carolina statute as a result of the restraints and burdens on Interstate Commerce imposed as alleged herein. Said injury, damage and loss has amounted to more than $10,000.00, and the Washington State apple industry, and its individual growers, as represented by the Plaintiff, who will continue to sustain such irreparable injury, damage and loss, unless the Court grants relief prayed herein." [A-32, ¶14]

This Court recently in *Warth v. Seldin*, 422 U.S. 490 (1975) extensively discussed the standing of a number of parties. An observation which is particularly pertinent in the present litigation is the distinction that the court recognized between an association seeking injunctive or declaratory relief as contrasted with damages on behalf of the membership. In noting this distinction, this Court stated, *supra* at 515:

> * * * whether an association has standing

> to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. E.g., National Motor Freight Assn. 372 US 246, 9 L Ed 2d 709, 83 S Ct 688 (1963). See Data Processing Servi[illegible]. Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827 (1970). Cf. Fed Rule Civ Proc 23(b)(2).

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such.

Finally, in *U.S. v. SCRAP*, 412 U.S. 669 (1973), this Court upheld the right of a number of environmental groups, to bring suit, including "Students Challenging Regulatory Agency Procedures (SCRAP)" even though the defendant challenged the standing of this group on the basis that the injury alleged was one which would be suffered by the public at large, and in any event the actual extent of injury to the Plaintiff's members was not significant. The Court found no merit to either objection. It said:

> Neither the fact that the appellees have claimed only harm to their use and enjoyment of the natural resources of the Washington area,

nor the fact that all of those whose resources suffered the same harm, deprives them of standing. Id at 686-687.

The Court continued

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion. *Id* at 688.

This Court most recently in *Singleton v. Wulff*, ... US ..... 49 L ed 2nd 826 (1976), discussed the concept of standing and stated:

> "Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. * * *" *Id* at 833

It is readily apparent from the facts in the current proceeding that the Washington producers and dealers do wish to challenge of the North Carolina statute as having an adverse impact on the operations of their industry, and the appellee has done so on its own and on their behalf.

> "* * * Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates

> of those rights are before them. * * *" *Id* at 833.

Again, there is no doubt that in the present proceedings there has been effective advocacy on behalf of the appellee and the Washington producers and dealers which it represents. This Court then observed:

> "* * * These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S., at 255. See also *Flast v. Cohen*, 392 U.S., at 99 n. 20; *McGowan v. Maryland*, 366 U.S. 420, 429 (1961).
>
> Like any general rule, however, this one should not be applied where its underlying justifications are absent. * * *" *Id* at 833

We respectfully submit that the underlying justifications referred to by this Court in Singleton, *supra*, are clearly absent in the present proceedings. Thus, this Court should reject the challenge to the standing of the Apple Commission to bring this action in its own right and/or as a representative of the Washington apple producers and dealers.

(a) *Jurisdiction under 28 U.S.C. § 1331*

The matter of jurisdictional amount can be difficult to determine when the Plaintiff seeks to enforce some right instead of suing for monetary damages. In suits where injunctions, or declaratory judgments are requested, the amount of the object sought to be gained by the Plaintiff determines the amount. *Glenwood Light and Water vs. Mutual Light*, 239 U.S. 121 (1915). The jurisdictional

amount is approached from the Plaintiff's perspective.

In those cases where a private businessman sues to enjoin the enforcement of a State statute as being an unreasonable interference with his business, the rule has been that the jurisdictional amount is determined by what it cost the businessman in loss profits in *one year* to comply with the State regulation. In the *Kroger vs. Luts* case, 299 U.S. 300, 301 (1936), the rule was stated as follows:

> The amount in controversy where it does not appear that the Complainant is deprived of its license or is prevented by regulations from prosecuting his business, the question is not the value or net worth of the business, but the value of right to be free from regulation, and they may be measured by the loss, of any, that would follow enforcement of the rule prescribed.

In the case at bar, the facts establish that the direct costs of obliterating Washington State grades from apple containers is 5¢ to 15¢ per carton (A. 27), which represents a cost range of $23,950 to $71,850 annually to comply with the North Carolina statute. Thus, the Washington producers have suffered loss of that sum plus the loss of business, which loss is well in excess of the $10,000 jurisdictional amount. Also, it is interesting to note that in *Florida Avocado Growers v. Paul*, 373 U.S. 132, 157 (1963), this Court found that "* * * it was conceded that the Florida growers had suffered damage in the amount of $1,500 by reason of the enforcement of the stat-

tute * * *" and did not attempt to allocate those losses to individual growers.

The record clearly establishes that the appellee Washington State Apple Advertising Commission expends at least $25,000 annually in the State of North Carolina in carrying out its responsibilities to promote and protect apple markets for Washington apples. The commission's interest which is affected by the statute is clearly in excess of the $10,000 jurisdictional amount. 28 USC § 1331.

In cases where there is no adequate remedy at law, the measure of the Federal question jurisdiction is the value of the right sought to be protected by injunctive relief. *Spock vs. David*, 469 F. 2d 1047 (1972); *Scherr vs. Volpee*, 466 F. 2d 1027 (1971); *Dodge vs. Nakai*, 298 F. Supp. 17 (1968).

There is a presumption that the amount in controversy claimed by the plaintiff as the worth of the right to be protected is correct and sufficient and dismissal for lack of the jurisdictional amount will only be given where there is legal certainty that it is less than $10,000.00 *Cortright vs. Resor*, 325 F. Supp. 797 (1971). In the *Cortright* case, the Plaintiffs were challenging the right of the Secretary of the Army to reassign members of the U.S. Army band for the purpose of halting public expressions of disagreement with the Vietnam war, the Plaintiffs implying that such actions violated their right of free speech. The Court said:

> Plaintiffs are alleging one of the most cherished

> constitutional rights—freedom of speech. There is an increasing reluctance to dispose of such Federal constitutional issues on jurisdictional grounds. In recent cases, the Supreme Court has tended to ignore lack of 1331 jurisdictional amount as a basis for dismissal. See *Breen vs. Selective Service Local Board No. 16*, 396 U.S. 60, 90 S. Ct. 661, 24 L ed. 2d 653 (1970) (citing other cases). * * *

The *Cortright* case was later overturned but on other grounds. See *Cortright vs. Resor*, 447 F. 2d 245 (1971).

The Washington Apple Growers, as represented by the Washington Apple Commission, have a clear right to have their apples graded according to Washington State grades. These grades, as a matter of fact are adopted only after input from and deliberation by the Apple Commission. When the Washington grades are placed upon a box of apples, it is not only the apple grower himself speaking but also the Washington Apple Commission and the whole industry. The industry and the individual growers have a right to free speech and the freedom to disseminate information concerning the apples which they are shipping. "(T)he constitutional right of liberty of press is enjoyed not only by individuals, but also by associations of individuals, such as labor unions, and through the constitutional guarantee of due process, by corporations." *Bowe et al. v. Secretary of the Commonwealth*, 69 N.E. 2d 115 (1946).

CONCLUSION

North Carolina Gen. Stat. § 106-189.1 demonstrably conflicts with the United States Constitution in that it is violative of the Interstate Commerce Clause, the Fourteenth Amendment, Due Process and Equal Protection Clauses, and the First Amendment guarantee of freedom of speech and expression. The statute in question does not serve to protect the North Carolina citizens from deception or any health hazard, and consequently is not grounded on any valid public purpose. It is respectfully submitted that this Court should affirm the judgment of the three-judge federal district court which has enjoined the enforcement of that provision of North Carolina General Statute 106-189.1 which prevents the display of Washington State apples grades on shipping containers transmitted into the State of North Carolina.

DATED this 17th day of December, 1976.

Respectfully submitted,

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I hereby certify that on this 17th day of December, 1976, three copies of the Brief of Appellee were mailed, postage paid, to Rufus L. Edmisten, Attorney General of the State of North Carolina, N.C. Department of Justice, P. O. Box 629, Raleigh, North Carolina 27602 and to John R. Jordan, Jr., P. O. Box 709, Raleigh, North Carolina 27602, counsel for appellants. I further certify that all parties required to be served have been served.

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